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IN THE
COURT OF APPEALS OF INDIANA

BRIAN L. SCHULTZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 66A03-0710-CR-464
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PULASKI CIRCUIT COURT
The Honorable Michael A. Shurn, Judge
Cause No. 66C01-0410-MR-1

October 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Brian Schultz appeals his conviction of Murder,[1] a felony. He presents the following restated issues for review:

1. Did the trial court improperly allow the admission of evidence regarding a custodial interrogation of Schultz where a portion of the interrogation was not recorded due to equipment malfunction or inadvertent error by the officer using the recording device?

2. Did the prosecutor commit misconduct amounting to fundamental error during closing argument?

3. Was an exhibit improperly admitted into evidence during the State's rebuttal case?

4. Did the trial court abuse its discretion in sentencing Schultz?

We affirm.

In October 2004, Schultz and his wife, Donna, lived in a trailer in rural Pulaski County. Donna's daughter, Leslie Carr, and Leslie's husband, John, lived nearby in another trailer. Donna's longtime friend, Maranne Glossinger, lived with the Carrs. Schultz and Donna were always welcome in the Carrs' trailer and often came in to use the phone because they did not have one.

On the morning of October 21, Schultz asked John to drive him to visit Randy Nelson. While they were with Nelson, Schultz drank a large quantity of vodka in a short period of time. Shultz became "totally cocky" and was "about as drunk as [Nelson had] seen him" in their twenty years of drinking together. *Transcript* at 584. John drove the intoxicated Schultz home early that afternoon. After he exited John's car, Shultz tried to sit down on cinder blocks and stumbled, dropping a can of beer into a well pit and almost falling in

[1] Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

himself.

Donna came out of the trailer and confronted Shultz about being intoxicated and not finishing some housework. She was upset and "hollering at him". *Id*. at 596. Shultz yelled in response and was "his obnoxious self." *Id*. at 532. As Donna went back inside, Shultz told John he was going to kill her. John replied, "Man, what is your problem? … That's your wife…." *Id*. at 533. John asked Shultz why he would say something like that and Shultz responded, "I'm going to kill her because of the property".[2] *Id*. John told Shultz to think about his kids and grandkids and not to say something like that. John then took Shultz's remaining beers and told Shultz he had had enough to drink. Shultz chased him around the car for the beers, and John eventually gave them to him and left. Glossinger was inside the trailer with Donna. They had been rearranging furniture that day. Glossinger left around 3:00 p.m., leaving both Shultz and Donna inside the trailer.

Around 4:00 p.m., John and Glossinger were working on a truck in a barn near the Carrs' trailer. Sam Salary, a neighbor, was also present. John heard a "pop" and, thereafter, Shultz drove up on a lawnmower and went inside the Carrs' trailer. *Id*. at 538. Shultz called his mother and told her twice, "I shot Donna." *Id*. at 625. He then told her, "I want you and dad to come down here, but I may not be here." *Id.*

[2] Shultz had previously told his mother that he wanted out of the marriage but did not know how he could do so because he and Donna had bought property together.

In the meantime, Glossinger had gone down to Shultz's trailer and discovered that Donna was dead. She came running back yelling from a distance. At the same time, Shultz walked outside and stated, "I killed her." *Id*. at 539. John ran to Glossinger and then frantically to Shultz's trailer where he confirmed that Donna was dead. John then ran back to Shultz, who was now back on his lawnmower, and struck him with a pole. Salary intervened and John said, "He killed Donna." *Id*. at 783. Shultz then stated to Salary, "She got into my brain and I killed her." *Id*. at 784. John attempted to strike Shultz again with the pole and Salary told him to let the police handle it. Soon thereafter, John and Salary realized that Shultz had a gun in the waistband of his pants. The three men wrestled for the gun, which Salary eventually recovered as Glossinger called the police. Shultz returned to his trailer.

Indiana State Police (ISP) Officer Aaron Campbell informed Shultz that he was being arrested for the murder of his wife and Shultz calmly responded, "Okay." *Id*. at 688. Donna's body was inside the trailer slumped over in a loveseat. She had been shot in the area of her right eye and there was gunpowder on her face and right shoulder. A large pool of blood had formed on the floor behind the loveseat. An autopsy determined Donna had suffered a single gunshot wound to the face. Subsequent investigation further revealed that Donna had been shot at close range (within twelve to eighteen inches) with the "old army Colt ball and cap black powder handgun" Salary had wrestled from Shultz. *Id*. at 814.

Following his arrest, ISP officers transported Shultz to the Pulaski County Jail. Although Shultz was still intoxicated around 9:00 p.m., the officers believed he was coherent and decided to interview him. The ISP officers wanted to videotape the interview but could

not get the jail's video recording equipment to function properly. The local sheriff's department personnel spent approximately an hour trying to fix the equipment. When these attempts proved unsuccessful, ISP Officers Richard Bonesteel and Brian Schnick proceeded with the interview at about 11:00 p.m. using Bonesteel's handheld audiotape recorder. Only about half of the interview was recorded, however, due to inadvertent equipment failure or operator error.

During the initial portion of the interview, Shultz acted unaware of his wife's shooting. He denied any knowledge of why he was in custody and claimed he had not seen his handgun that day. Shultz reported that the only thing he remembered was Glossinger screaming and then John striking him with a pole. He said the next thing he remembered was waking up handcuffed in his front yard. Later in the interview, Shultz said he remembered some of the earlier events of the day, such as drinking at Nelson's and chasing John around the car for beer. Officer Schnick then challenged Schultz's selective memory. The tape abruptly ended at about this point in the interview.

During the unrecorded portion of the interview, Shultz eventually explained that he had become upset with Donna for rearranging the furniture and moving his gun. Shultz claimed he threw the gun on the bed to show where it should have been kept and the gun discharged. Thus, he claimed the shooting was an accident.

The State charged Shultz with murder. At trial, Shultz testified on his own behalf. He explained that he was an alcoholic and Donna was not happy when he returned home from drinking with Nelson. He said he was sitting on the loveseat with Donna and asked her

where she had put his gun when she moved the furniture. According to Shultz, he put his hand out as she retrieved the gun and, at the same time, he looked away to find his dog. Shultz claimed that he heard a shot, felt the gun hit his hand as it was ejected toward him, and then realized that Donna had been shot. He claimed he blacked out after Donna was shot and after being hit by John. Finally, Shultz denied making the statements attributed to him during the unrecorded portion of his interview, and he testified that he was only able to piece together what happened about a week after the shooting. Shultz presented expert testimony in support of his accidental shooting defense.

Following a lengthy jury trial, Shultz was convicted as charged on May 24, 2007. Thereafter, the trial court sentenced him to sixty-three years in prison for Donna's murder. Shultz now appeals his conviction and sentence. Additional facts will be presented below as necessary.

1.

Schultz challenges the admission of testimony regarding the unrecorded portion of his custodial interrogation. He claims the admission of such testimony violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution as well as under the due course of law provision in article 1, section 12 of the Indiana Constitution.

We initially observe that, contrary to Schultz's position on appeal, this case does not involve the negligent destruction of material evidence. The evidence establishes that the second portion of the interrogation was never recorded due to equipment failure or operator error. There was simply no recording to destroy and evidence of the unrecorded portion of

the interrogation would have to come from the testimony of the officers, based upon their recollection of the interrogation. Thus, this case involves the "creation of evidence which would provide alternative, but perhaps more reliable, proof of a fact, or would confirm and be in addition to other evidence of the same fact." *Stoker v. State*, 692 N.E.2d 1386, 1389 (Ind. Ct. App. 1998).

Shultz urges us to impose a new rule of law in Indiana that all custodial interrogations in places of detention must be electronically recorded. We have established, however, that the Indiana Constitution, as well as the United States Constitution, does not require police officers to record custodial interrogations in places of detention. *See Gasper v. State*, 833 N.E.2d 1036 (Ind. Ct. App. 2005), *trans. denied*; *Stoker v. State*, 692 N.E.2d 1386. The law is clear that recording custodial statements is strongly encouraged, but not constitutionally mandated.[3] We decline Schultz's invitation to reject this well-accepted rule of law, which has been left unchanged by our Supreme Court and General Assembly for the last ten years. Therefore, the trial court did not err in admitting evidence of the entire interrogation.

2.

Schultz challenges the following statement made by the prosecutor during her closing argument to the jury:

> The Indiana State Police Detectives are trained to interview to find the truth; they are not related to any interested party; they do not get paid extra to get a confession, and they would have no incentive to make up a version that does not qualify as a confession.

[3] In *Stoker*, we indicated that although law enforcement should ideally record all custodial interrogations, equipment malfunction would constitute an acceptable excuse for (inadvertently) failing to record. *Stoker v. State*, 692 N.E.2d 1386. This is essentially what occurred here.

Transcript at 1751. He claims this statement amounted to improper vouching for the credibility of the interrogating officers. Because he did not object at trial, Schultz couches his argument in terms of fundamental error.

In reviewing a properly preserved claim of prosecutorial misconduct, we determine whether the prosecutor engaged in misconduct, and if so, whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Cooper v. State*, 854 N.E.2d 831 (Ind. 2006). The gravity of peril turns on the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Id*.

Where a claim of prosecutorial misconduct has not been properly preserved, as here, the appellant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. *Id*. "Fundamental error is an extremely narrow exception 'and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'" *Baer v. State*, 866 N.E.2d 752, 763-64 (Ind. 2007) (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)).

Schultz has failed to establish prosecutorial misconduct resulting in grave peril, let alone fundamental error. Schultz claims the officers' "credibility in handling, conducting, and then preserving the record of their interrogation had to be accepted by the jury if the State's case was to succeed." *Appellant's Brief* at 24. This is simply not true. Contrary to Shultz's claim on appeal, the unrecorded portion of his statement and the officers'

recollection thereof was not vital to the State's case. Although the State certainly attempted at trial to discredit his prior claim that the shooting was an accident, the State presented overwhelming evidence of guilt through witnesses, physical evidence, and experts.[4]

3.

Schultz next challenges the admission of State's Exhibit 93 during its rebuttal case. He appears to claim that the exhibit should have been excluded from evidence because the picture had not been provided to him by the State during discovery.

The trial court typically enjoys broad discretion in ruling on violations of discovery, and we will reverse only if the court has abused its discretion. *Beauchamp v. State*, 788 N.E.2d 881 (Ind. Ct. App. 2003). "With respect to rebuttal witnesses, nondisclosure is excused when that witness was unknown and unanticipated." *Id*. (citing *Sloan v. State*, 654 N.E.2d 797 (Ind. Ct. App. 1995), *trans. denied*). The purposes of pretrial discovery are to enhance the accuracy and efficiency of the fact-finding process and to prevent surprise by permitting the parties adequate time to prepare their cases. *Beauchamp v. State*, 788 N.E.2d 881. "Exclusion of evidence as a discovery abuse sanction is proper where there is a showing that the State engaged in deliberate or otherwise reprehensible conduct that prohibits the defendant from receiving a fair trial." *Id*. at 892-93.

[4] To the extent Schultz claims (in a single sentence) that trial counsel was ineffective for failing to challenge the prosecutor's statements, we find the issue waived for failure to present cogent argument. Moreover, we caution counsel that our Supreme Court has repeatedly stated that although claims of ineffective assistance of trial counsel may be brought on direct appeal, the preferred method of presenting such claims is on post-conviction review. *See McIntire v. State*, 717 N.E.2d 96 (Ind. 1999); *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998). However, if a defendant does choose to present the issue on direct appeal, a challenge to the effectiveness of trial counsel will be foreclosed from later collateral review. *See Woods v. State*, 701 N.E.2d 1208.

In the instant case, it is undisputed the prosecutor had no knowledge that the pathologist, Dr. Joseph Prahlow, had taken autopsy photographs independently of the crime scene investigator until Schultz elicited such information from Prahlow on cross-examination.[5] Thereafter, the State promptly obtained this previously unknown, unanticipated evidence and provided the photograph to Schultz. Under the circumstances, the trial court did not abuse its discretion by allowing the State to admit the photograph during its rebuttal case despite nondisclosure of the photograph during pretrial discovery. *Cf. id*. at 894 (finding abuse of discretion where it was "quite apparent here that Dr. Luerssen was a known and anticipated expert rebuttal witness by the State" and "the State was certainly aware that Dr. Luerssen was prepared to offer such new opinions even though they had not been provided to Beauchamp").

4.

Finally, Schultz challenges his sixty-three-year sentence. He claims the trial court failed to provide a sentencing statement to "delineate which convictions [were] considered with more gravity, and their proximity and relation to the current conviction." *Appellant's*

[5] The challenged exhibit, Exhibit 93, is a photograph of Donna's right hand. The photograph, which appears washed out, does not show a dark area near the base of her thumb. The State sought to admit the photograph to rebut Schultz's contention that another photograph, State's Exhibits 33, showed a gray area that could have been gunshot residue resulting from the victim holding the gun when it was fired. During the State's case-in-chief, Prahlow unequivocally testified that during the autopsy he observed no evidence of gunshot residue on Donna's hand. He opined that the dark area on the photograph was a shadow. Another expert for the State, a forensic scientist, testified that photographs are "notoriously poor in perspective" and opined that if there had been gunshot residue on the decedent's hand, it would have been indicated in the autopsy report. *Transcript* at 1318. In light of the testimony elicited during the State's case-in-chief, we cannot agree with Shultz that Exhibit 33 "strongly supported" his theory of defense at trial. *Appellant's Brief* at 26.

Brief at 11. He further asserts his prior nonviolent criminal history does not support an enhancement of eight years.

Sentencing determinations generally rest within the trial court's discretion. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). It is within the trial court's discretion to determine whether a presumptive sentence[6] will be enhanced in light of aggravating factors. *Soliz v. State*, 832 N.E.2d 1022 (Ind. Ct. App. 2005), *trans. denied*.

> If the trial court relies on aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances.

Cotto v. State, 829 N.E.2d at 523-24. Here, the trial court identified Schultz's criminal history as the sole aggravating circumstance and found no mitigating circumstances. Thus, the court was not required to articulate its balancing of aggravating and mitigating circumstances because it found no mitigating circumstances. *See Wooley v. State*, 716 N.E.2d 919 (Ind. 1999).

We initially observe that the trial court issued an adequate sentencing statement. At the sentencing hearing, the trial court stated:

> I have considered everything before the Court, including the pre-sentence and addenda, all the admitted exhibits today, considered the Defendant's prior criminal history as an aggravating factor, and found no mitigators.
>
> I'm going to order a sentence of 63 years in the Indiana Department of Corrections [sic], with none suspended….

[6] Our sentencing statutes now provide for "advisory" rather than "presumptive" sentences. Schultz, however, was sentenced under our former sentencing statutes because he committed the murder before the substantial revision of our sentencing scheme. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) ("sentencing statute in effect at the time a crime is committed governs the sentence for that crime").

> The sentence of shortly less than the maximum…is not intended to depreciate the victims' view of their mother's life. It's just the Court considers everything in the scheme of sentencing and…the extent of the Defendant's prior record, and arrives at that [sic] years of 63, not [saying that]…your mother's life is not worth 65.

Transcript at 1898-99. Further, the written sentencing order made clear that the court viewed Schultz's criminal history as "extensive" and indicated that the history consisted of a number of alcohol and driving-related offenses. *Appellant's Appendix* at 22.

Relying on *Wooley*, Schultz argues the trial court abused its discretion in considering his criminal history as aggravating. In this regard, he asserts his prior history consists of only driving and alcohol-related convictions, with no convictions for crimes of violence.

In *Wooley*, our Supreme Court held that "a criminal history comprised of a single, nonviolent misdemeanor is not a significant aggravator in the context of a sentence for murder." *Wooley v. State*, 716 N.E.2d at 929 (footnotes omitted). The Court explained:

> Significance varies based on the gravity, nature and number of prior offenses as they relate to the current offense. Therefore, a criminal history comprised of a prior conviction for operating a vehicle while intoxicated may rise to the level of a significant aggravator at a sentencing hearing for a subsequent alcohol-related offense. However, this criminal history does not command the same significance at a sentencing hearing for murder.

Id. at 929 n.4; *see also Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006) ("weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability").

While Shultz does not favor us with a specific discussion of his criminal history or provide us with a copy of his presentence investigation report, the record reveals that Shultz -

- unlike the defendant in *Wooley* -- has a number of prior misdemeanor (several for operating while intoxicated, as class A misdemeanors) and felony (two for being a habitual traffic offender, a class D felony) convictions. *See Vasquez v. State*, 762 N.E.2d 92 (Ind. 2001) (distinguishing *Wooley*, in part, based upon the fact Vasquez had three prior misdemeanor convictions, not just one). Further, he was on probation in one cause and out on bond in another cause at the time he committed the instant murder. Finally, we observe that the instant offense involved the excessive use of alcohol by Shultz. As our Supreme Court has observed after *Wooley*, "there is no requirement in case law or statute that a prior history contain violent crimes before a defendant's criminal history may be taken into account in sentencing for a violent crime." *Ford v. State*, 718 N.E.2d 1104, 1107 (Ind. 1999). Shultz's criminal history was clearly a proper aggravator under the circumstances. *See Ford v. State*, 718 N.E.2d 1104.

Judgment affirmed.

DARDEN, J., and BARNES, J., concur